United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig w/affidavit of mailing

76-1526

To be argued by
DOUGLAS J. KRAMER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1526

B/s

UNITED STATES OF AMERICA,
Appellee,

—against—

GEORGE R. BAKER,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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Preliminary Statement

George R. Baker appeals from a judgment of the United States District Court for the Eastern District of New York (Pratt, *J.*) entered on October 29, 1976, convicting him, after a jury trial, of conspiracy to defraud the United States and the Social Security Administration by obtaining and aiding in the obtaining of payment of false, fictitious, and fraudulent claims in violation of Title 42, United States Code, Section 286.

Appellant Baker was sentenced to three years imprisonment and is free on bail pending appeal.

In this appeal, appellant argues that: 1) A statement of his wife and co-conspirator, Rose Marie Baker, was improperly admitted in evidence at trial in violation of

his Sixth Amendment right of confrontation; 2) that there was insufficient evidence to support the verdict; and 3) that the court erroneously failed to charge that the Government had to establish that the conspiracy actually existed on or before the date charged in the indictment.

Statement of Facts

On September 15, 1974, appellant Baker went sailing in his boat on the Great South Bay in Suffolk County and allegedly disappeared (59).[1] Three days later, on September 18, 1974, appellant's wife, Rose Marie Baker, informed an attorney, Floyd Sarisohn, that her husband had disappeared while boating, and she sought assistance in securing the benefits from his life and accidental death insurance policies (139-140).[2] Subsequently, Mrs. Baker filed claims against a $25,000 accidental death and dismemberment policy and a $10,000 life insurance policy (73, 77, 116).[3]

On June 16, 1975, Mrs. Baker filed applications for Mother's Insurance benefits and Surviving Child's Insurance benefits with the Social Security Administration (86-88). She commenced receiving benefits from these programs on July 25, 1975, and continued to receive monthly payments for herself and her children through February 3, 1976 (89-90).

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[1] Numbers in parentheses refer to pages of the trial transcript.

[2] Rose Marie Baker was charged as a co-conspirator and pleaded guilty to a single count of mail fraud (T. 18 U.S.C. § 1341), in that for the purpose of executing a scheme and artifice to defraud the United States she did take and receive from the mail on July 25, 1975, two social security checks for a combined amount of $5,958.60. After a plea of guilty, she was sentenced to five years probation.

[3] Neither of these claims was honored because investigation revealed that appellant was not dead (74-75, 78).

On June 29, 1975, appellant and his wife appeared at the Long Island home of Barton Forbes in response to an advertisement which Mr. Forbes had placed in *Newsday* for the sale of a mobile home (149-151, 158). Appellant and his wife purchased the vehicle on August 8, 1975 (153-154). Forbes noted that while Mrs. Baker had identification and was willing to sign the bill of sale, appellant offered no identification and was reluctant to place his name on the document (161-163).[4]

At the same time that the appellant and his wife were negotiating to purchase the motor home and were traveling around the country, Mrs. Baker was proceeding in New York State Surrogate's Court to have her husband declared dead and to have Letters of Administration issued (109-111, 230-232). In connection with these proceedings, Mrs. Baker filed three affidavits (Gov. Exhibits 11, 12, 13, at 109-111), wherein she stated that she did not know the whereabouts of her husband. In addition, on November 12, 1975, Mrs. Baker testified under oath in Surrogate's Court that she had neither seen nor heard from her husband since his disappearance in September, 1974 (230-232).[5] Mrs. Baker vigorously continued to pursue her claims against the insurance companies during the early part of 1976, and as late as April 2, 1976, she claimed ignorance of her husband's existence or whereabouts (141-146).[6]

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[4] Thereafter, further investigation disclosed that a TWA Credit Card, obtained by Mrs. Baker in May 1975, was used after Mr. and Mrs. Baker were seen together by Forbes, in connection with travels to Montana, California, Colorado, New Mexico, Texas, Virginia, and Illinois (100-101).

[5] On December 8, 1975 the Surrogate's Court declared appellant dead (Gov. Exhibit 16).

[6] Appellant and his wife were arrested together on April 6, 1976.

In early January, 1976, appellant and his wife, along with their children, were residing at the Sunrise Beach Campground in Sunrise, Texas (176-181). While registering at the campground, appellant refused to sign his name, but insisted on signing his wife's name (179-181). During this period appellant was employed at the Honcho Drilling Company in Alice, Texas, where he worked under the name of "Ed" or "Edward" Baker and used a false social security number and birth date (187-190, 197-199).

Both appellant and his wife gave statements to Social Security investigators after their arrest in Ohio (55-56). In his statement, appellant admitted to intentionally disappearing on September 15, 1974, but claimed that he never intended to defraud the Social Security Administration. He stated that he was about to stop the receipt of Social Security benefits when he was arrested (59-61). Mrs. Baker stated that she was not aware of her husband's existence until the latter part of 1975 or early 1976 and that she too was preparing to have the payments terminated when she was arrested (63-66).

Appellant did not take the witness stand and did not call any witnesses on his behalf.

ARGUMENT

POINT I

The Court Properly Admitted The Statement Of Rose Marie Baker.

Appellant claims that the court erred in admitting a statement of his wife, Rose Marie Baker, given after her arrest, which statement, in part, implicated appellant. Appellant argues, without elaboration, that admission of

his wife's statement denied him his "right of confrontation." (Appellant's Brief, page 6).

Following their arrest, appellant and his wife were jointly interviewed by Social Security investigators. During the joint interview, at which their attorney was present, both gave statements concerning their involvement in the scheme to defraud the Government (54-55). Thereafter, appellant and his wife were indicted as co-conspirators. As indicated above, prior to trial Mrs. Baker pleaded guilty to a count in the indictment charging mail fraud.

Prior to the commencement of trial, the Government made an offer of proof of the statement of appellant's wife. A colloquy followed between the court and counsel concerning the availability of Mrs. Baker to testify at trial and the use of the wife's statement (11 et. seq). Defense counsel stated that his client would claim the marital privilege (11), thus making Mrs. Baker unavailable to the prosecution.[7] The defense also expressly reserved the right to call Mrs. Baker on behalf of the defendant (13).

The Government then stated that it intended to offer Mrs. Baker's statement under the exception to the hearsay rule embodied in Fed. R.Evid. 804(b)(3),[8] as a statement against interest of an unavailable declarant. The defense objected on the "ground of hearsay." (14). After some

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[7] The record reflects that Mrs. Baker also indicated that she would claim the privilege (11), but at no time did she actually claim the privilege on the record.

[8] Fed. R. Evid. 804(b)(3): "A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true. . ."

discussion of the matter, appellant's attorney focused on the portion of the wife's statement where she said:

> "We both were concerned about receiving the Social Security benefits. We felt we had committed a Federal crime and thought we should contact an attorney . . ." (17).[9]

The defense objected to the admission of this statement because "it's a conclusion on her part, it's hearsay, it violates every rule of evidence with respect to the defendant." (17, see also 20).

The court ruled that the entire statement by appellant's wife was admissible under Fed. R. Evid. 804(b)(3) as a statement against interest. The court also ruled that the particular portions of the wife's statement objected to as conclusory were admissible (21). At the trial, when Mrs. Baker's statement was formally offered into evidence, appellant again objected on grounds of hearsay (62, 63), and the court overruled the objection "on those grounds." (63). Now, on appeal and for the first time, appellant contends that the admission of the statement violated his Sixth Amendment right of confrontation. He characterizes the objection as being controlled by *Bruton*

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[9] Appellant's statement, given to the Social Security investigators at the same time as his wife's and also admitted in evidence, contained the following:

> "We were also receiving Social Security benefits. We did not take any action to stop the Social Security benefits. . . We had been planning to contact an attorney to straighten out our affairs with Social Security since we resumed living together" (61).

The full statement of the appellant may be found on pages 58-61 of the trial transcript, and that of Mrs. Baker on pages 63-66. In practically every respect, the statements paralleled each other.

v. *United States*, 391 U.S. 123 (1968). Appellant's claim is without merit.[10]

The hearsay objection was fully met by Fed. R. Evid. 804(b)(3). Appellant's wife was clearly unavailable within the meaning of Fed. R. Evid. 804(a)(1),[11] because appellant had exercised his marital privilege to prevent his spouse from testifying against him. See Supreme Court Standard 505(a),[12] *United States* v. *Machiewicz*, 401 F.2d 219, 225 (2d Cir.), *cert. denied*, 393 U.S. 923 (1968). Moreover, as required by Rule 804(b)(3), the statement was against the wife's penal interest, in that she admitted receiving Social Security benefits for the death of her husband while she knew him to be alive. Indeed, appellant does not appear to challenge the evidentiary ruling below on the hearsay question.

However, even if appellant had properly objected to admission of his wife's statement on confrontation grounds he would not have stated a ground for exclusion. The

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[10] Appellant never raised his confrontation objection below. As noted above, appellant objected to the entirety of his wife's statement on the grounds of hearsay and to particular portions of her statement as conclusory. The confrontation clause is not a mere codification of the hearsay rules of evidence. *United States* v. *Puco*, 476 F.2d 1099, 1102 (2d Cir.), *cert. denied*, 414 U.S. 844 (1973). The failure of appellant to object to his wife's statement on Sixth Amendment grounds was no mere technicality. Because appellant raised only a traditional hearsay objection, the court and the prosecution focused on the exception to the hearsay rule under which the statement would be admissible. A full inquiry under *Dutton* v. *Evans*, 400 U.S. 74 (1970), as to the reliability of the statement was thus not held. See page 9, *infra*.

[11] Fed. R. Evid. 804(a)(1). . . "'Unavailability as a witness' includes situations in which the declarant (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement. . ."

[12] Supreme Court standard 505(a): "An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him."

Sixth Amendment provides an accused with the right to be confronted with the witnesses against him. This right is satisfied where the accused has an opportunity to cross-examine the witness. *United States* v. *Bujese*, 434 F.2d 46, 48 (2d Cir.), *cert. denied*, 401 U.S. 978 (1971). While appellant's wife was unavailable to the prosecution because of appellant's exercise of his marital privilege, the wife was not unavailable to the appellant himself. Indeed, appellant expressly reserved the right to call his wife as a witness when he exercised his marital privilege (13). There is nothing in the record to indicate that appellant's wife would not have testified if called by him; his failure to call and examine her cannot be used as the basis for asserting a denial of the Sixth Amendment right of confrontation. See *United States* v. *Insana*, 423 F.2d 1165, 1168 (2d Cir.), *cert. denied*, 400 U.S. 841 (1970).

Bruton v. *United States*, *supra*, is clearly inapposite. *Bruton* involved the case of co-defendants on trial together, which was not the case here. "The *Bruton* rule is limited to circumstances where the out-of-court statements are inadmissible hearsay [as to the non-declarant.]" *United States* v. *Kelley*, 526 F.2d 615, 620 (8th Cir.), *cert. denied*, 424 U.S. 971, (1976). See also cases collected Id. at 620 n.6. In the instant case the wife's statement was admissible against the appellant pursuant to Fed. R. Evid. 804(b)(3).[13]

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[13] In *Bruton*, the Supreme Court stated (391 U.S. at 128 n.3): "We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence, the problem arising only because the statement was admissible against the declarant Evans. There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned, and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause (Citations omitted)."

Moreover, the facts of this case clearly demonstrate that Mrs. Baker's statement met the standards of *Dutton* v. *Evans*, *supra*, for admitting a statement under an exception to the hearsay rule in compliance with the "Confrontation Clause." Indeed, the jury had more than "a satisfactory basis for evaluating the truth of the extrajudicial declaration." *United States* v. *Adams*, 446 F.2d 681, 683 (9th Cir.), *cert. denied*, 404 U.S. 943 (1971); see also *Dutton* v. *Evans*, *supra*, 400 U.S. at 89.

To begin with, Mrs. Baker's statement was an admission of her role in the conspiracy to defraud the Social Security Administration. As such, it bore strong indicia of reliability because it was a declaration against penal interest. *Dutton* v. *Evans*, *supra*, 400 U.S. at 89, *United States* v. *D'Amato*, 493 F.2d 359, 365 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974). In addition, the statement was unambiguous, *United States* v. *Kelley*, *supra*, 526 F.2d at 621, and was made by a person who was familiar, as a co-conspirator, with the plan to defraud the government and was practically identical to the statement given by appellant himself. *Id.*

Furthermore, it can hardly be argued that the statement was crucial to the prosecution or devastating to appellant's case. See *United States* v. *Puco*, *supra*, 476 F.2d at 1104. The jury had before it appellant's statement, as well as the evidence concerning his concocted death, the taking out of insurance policies, the purchase of the mobile home and the use of a false social security card.

Finally, it is to be noted that in view of the fact that appellant's statement and that of his wife were so similar, the two statements may properly be viewed as "interlocking," thus eliminating any *Bruton* problem which may have existed. *United States ex rel. Duff* v.

Zelker, 452 F.2d 1009, 1010 (2d Cir.), *cert. denied*, 406 U.S. 932 (1972), *United States ex rel. Standbridge* v. *Zelker*, 514 F.2d 45, 48-49 (2d Cir.), *cert. denied*, 423 U.S. 872 (1975).

For all the above reasons, the trial court did not err in admitting the statement of appellant's wife.

POINT II

There Was Sufficient Evidence To Support The Verdict.

Appellant argues that there was insufficient evidence to support the verdict that he conspired to defraud the Social Security Administration.

We note that it is well settled that in determining whether there was sufficient evidence to sustain a verdict, this Court must view the evidence in the light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60 (1942).

Here, appellant himself admitted that he participated in the false disappearance scheme. Moreover, the alleged death occurred within less than a year from the date of purchase of a life insurance policy and an accidental death policy (73, 77), and application for benefits under the policies were made by appellant's wife within three days of the disappearance.

In addition, appellant was positively identified as being present with his wife when they purchased the mobile home less than two weeks after she applied for social security benefits on account of his death. Thereafter, while Social Security checks were being received, appellant used a false name and, even more significantly,

a false social security number while working in Texas. And following his arrest, appellant gave a partially false exculpatory statement concerning his presence with his wife stating that "in December, 1975 or January, 1976, I first contacted my wife, . . . the date of our meeting may have been as early as August." (60). Cf. *United States* v. *Parness*, 503 F.2d 430, 438 (2d Cir.), *cert. denied*, 419 U.S. 1105 (1975).

Thus, there was more than sufficient evidence on the basis of which a reasonable juror could have found appellant guilty. *United States* v. *Rivera*, 513 F.2d 519, 528-530 (2d Cir.), *cert. denied*, 423 U.S. 948 (1975).

POINT III

The Court Did Not Err In Refusing To Charge That The Government Had To Prove That A Conspiracy Actually Existed On Or Before September 15, 1974.

The indictment charged a conspiracy commencing on or before September 15, 1974 and continuing up to and including April 9, 1976, both dates being approximate and inclusive. The appellant claimed at trial that the evidence showed no more than a conspiracy commercing on or about June 29, 1975, when appellant and his wife were first seen together after the appellant's disappearance. Appellant sought a charge from the court that the government had to prove a conspiracy commencing on September 15, 1974, the date of appellant's disappearance. The charge was refused.

The proof showed acts by the appellant, which could have been found by the jury to have been in furtherance of the conspiracy, which occurred even before the September 14, 1975, disappearance—for example, the purchase

of the accidental death and life insurance policies. The jury could also, of course, have found the September 1974 disappearance to have been an act in furtherance of the conspiracy.

In any case, the indictment charges "approximate" dates, and if there was a variance it was not fatal, both because appellant has shown no prejudice and because the evidence clearly showed a conspiracy taking place during the period between the dates charged. *United States* v. *Ramirez*, 482 F.2d 807, 816 (2d Cir.), *cert. denied, sub nom. Gomez* v. *United States*, 414 U.S. 1070 (1973).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: January 21, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
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DOUGLAS KRAMER being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 24th day of January 1977 he served a copy of the within

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by placing the same in a properly postpaid franked envelope addressed to:

Paul Barahal, Esq.
86 Fox Boulevard
Massapequa, New York 11758

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

DOUGLAS KRAMER

Sworn to before me this
24th day of January 1977

Carolyn N. Johnson

CAROLYN N. JOHNSON
Notary Public, State of New York
No. 41-[illegible]
Qualified in [illegible]
Term expires March 30, 1977